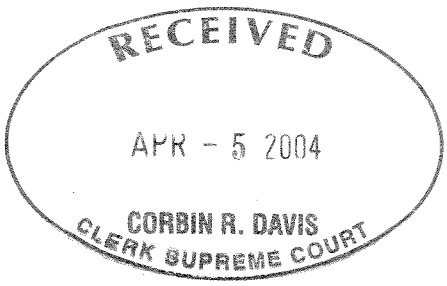

STATE OF MICHIGAN

IN THE SUPREME COURT

WAYNE COUNTY,

Plaintiff-Appellee,

-vs-

EDWARD HATHCOCK,

Defendant-Appellant,

_____/

Supreme Court No. 124070

Court of Appeals No. 239438

Wayne Circuit Court No. 01-113583-CC

WAYNE COUNTY,

Plaintiff-Appellee,

-vs-

AARON T. SPECK & DONALD E. SPECK,

Defendants-Appellants,

_____/

Supreme Court No. 124071

Court of Appeals No. 239563

Wayne Circuit Court No. 01-114120-CC

WAYNE COUNTY,

Plaintiff-Appellee,

-vs-

AUBINS SERVICE, INC, DAVID R. YORK, Trustee, David York Revocable Living Trust,

Defendants-Appellants,

_____/

Supreme Court No. 124072

Court of Appeals No. 240184

Wayne Circuit Court No. 01-113584-CC

WAYNE COUNTY,

Plaintiff-Appellee,

-vs-

JEFFREY J. KOMISAR,

Defendant-Appellant,

_____/

Supreme Court No. 124073

Court of Appeals No. 240187

Wayne Circuit Court No. 01-113587-CC

WAYNE COUNTY,

Plaintiff-Appellee,

-vs-

ROBERT & LELA WARD,

Defendants-Appellants,

-and-

HENRY Y. COOLEY,

Defendant,

_____/

Supreme Court No. 124074

Court of Appeals No. 240189

Wayne Circuit Court No. 01-114113-CC

WAYNE COUNTY,

Plaintiff-Appellee,

-vs-

MRS. JAMES GRIZZLE &
MICHELLE A. BALDWIN,

Defendants-Appellants,

-and-

RAMI FAKHOURY,

Defendant,

_____/

Supreme Court No. 124075

Court of Appeals No. 240190

Wayne Circuit Court No. 01-114115-CC

WAYNE COUNTY,

Plaintiff-Appellee,

-vs-

STEPHANIE A. KOMISAR,

Defendant-Appellant,

_____/

Supreme Court No. 124076

Court of Appeals No. 240193

Wayne Circuit Court No. 01-114122-CC

WAYNE COUNTY,

Plaintiff-Appellee,

-vs-

THOMAS L. GOFF, NORMA GOFF, MARK,
A. BARKER & KATHLEEN A. BARKER,

Defendants-Appellants,

_____/

Supreme Court No. 124077

Court of Appeals No. 240194

Wayne Circuit Court No. 01-114123-CC

WAYNE COUNTY,

Plaintiff-Appellee,

-vs-

VINCENT FINAZZO,

Defendant-Appellant,

-and-

AUBREY & DULCINA GREGORY,

Defendants,

_____/

Supreme Court No. 124078

Court of Appeals No. 240195

Wayne Circuit Court No. 01-114124-CC

DEFENDANTS-APPELLANTS' REPLY BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

PROOF OF SERVICE

ZAUSMER, KAUFMAN,
AUGUST & CALDWELL, PC
MARK J. ZAUSMER (P31721)
Attorney for Plaintiff-Appellee
31700 Middlebelt Road, Suite 150
Farmington Hills, MI 48334-2374
(248) 851-4111

ACKERMAN & ACKERMAN, PC
ALAN T. ACKERMAN (P10025)
DARIUS W. DYNKOWSKI (P52382)
Attorneys for Defendants-Appellants Except Specks
5700 Crooks Road, Suite 405
Troy, MI 48104
(248) 537-1155

PLUNKETT & COONEY, P.C.
MARY MASSARON ROSS (P43885)
Appellate Counsel for Defendants-Appellants
Except Specks
535 Griswold, Suite 2400
Detroit, MI 48226
(313) 965-4801

ALLAN FALK, PC
ALLAN S. FALK (P13278)
Appellate Counsel for Defendants-Appellants
Except Specks
2010 Cimarron Drive
Okemos, MI 48864
(517) 381-8449

MARTIN N. FEALK (P29248)
Attorney for Defendants-Appellants Specks
20619 Ecorse Road
Taylor, MI 48180-1963
(313) 381-9000

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MISCELLANEOUS

A. Neither Wayne County Nor The Amici Supporting The County's Position Have Established That The Michigan Legislature Has Delegated Power To The County To Take Property For A Mixed Use Business Park On Property That Is Not Blighted, That The Taking Is Necessary, Or That The Constitution Permits A Taking To Assemble Property For Sale To Private Entities For A Private Mixed Use Business Park.

The Court must decide two major issues, either of which is sufficient to result in a ruling in favor of the property owners. First, Wayne County lacks authority, pursuant to MCL 213.23 or otherwise, to take the defendants' properties. The power of eminent domain must be delegated to a local government—and Wayne County is unable to point to a delegation of power to take property to assemble it for sale to private entities for a private mixed use business park when the property is not blighted or environmentally contaminated or a slum. The County also lacks power to proceed because it has not demonstrated that the project it proposes is necessary or that the specific parcels at issue here are necessary. The County also lacks power to take property because it has not shown that this project is for a public use or benefit as is required under MCL 213.23. Second, the County's proposed taking violates the Michigan Constitution because assembly of non-blighted land for sale to private entities for a private mixed use business park is not a "public use" within the meaning of the Michigan Constitution. Const 1963, art 10, § 2. Despite the voluminous briefs filed on behalf of Wayne County, not one has located a source of power authorizing a county to take private property in these circumstances and not one has pointed to a Michigan decision approving the use of eminent domain to assemble non-blighted land for sale to private entities for a private mixed use business park. Thus, this Court should overturn the lower court rulings and rule in favor of the property owners. Any such ruling, whether based on overruling or distinguishing *Poletown*, should apply to the parties to this appeal.

B. In The Absence Of Any State Legislative Declaration That County Development Of A Mixed Use Business Park Amounts To A Public Use Or That The Taking Of Property Is Necessary To Accomplish That Use, MCL 213.23 Does Not Permit Wayne County To Take Defendants' Property.

1. The Michigan Legislature Has Not Delegated Power To Wayne County That Is Sufficient To Take The Defendants' Property.

Wayne County argues that the Michigan Legislature delegated the power of eminent domain to counties to take private property for the purpose of assembling private property for sale to private entities to use in a mixed use business park. The County looks solely to 1911 Act 149, as amended by 1966 PA 351, codified at MCL 213.21 et seq. and its charter as the source of its power. (Wayne County's Brief, p 6). This argument must be rejected because it is inconsistent with this Court's reasoning in *Lansing v Edward Rose Realty*, 442 Mich 626, 634-639; 502 NW2d 638 (1993).

General enabling statutes delegate only powers that are essential or indispensable to the objects and purposes of the local government; this does not include the right to condemn property for purposes that are not essential or indispensable to the local government's purposes. *Edward Rose Realty, supra*. The city sought to condemn an easement thus overriding a landlord's refusal to contractually agree to running cable through the property to reach the apartments. *Edward Rose Realty*, 442 Mich at 632-33. This Court held that the City's effort was beyond the scope of its delegated powers. *Id.* Neither MCL 213.24 nor MCL 117.1 declared as "a general public purpose that city-franchised operators have mandatory access to all rental properties." 442 Mich at 633-637. *Edward Rose Realty* illustrates the analysis that applies here and supports the property owners' argument that Wayne County cannot find a delegation of power in the words of MCL 213.23:

> The city is authorized to condemn private property for any public use within the scope of its powers. The cited enabling statutes, however, do not specifically

> authorize the takings in the present case. There is no state statute identifying as a public use or purpose that mandatory access onto private property by a city franchise cable television provider.

442 Mich at 633. MCL 213.23 does not specifically authorized a county to condemn property to develop a mixed use business park, a project beyond any essential or indispensable function of county government. Nor does it declare that a mixed use business park is a public use.

Contrary to the position taken by amici, judicial deference to "is not similarly employed when reviewing determinations of public purpose made by municipalities pursuant to broad, general enabling statutes." 442 Mich at 637. Courts have traditionally limited a local government's effort to condemn property in the absence of specific statutory authority. See e.g. *Daniels v Area Plan Commission of Allen City*, 306 F3d 445, 461 (2002) (takings made by local agencies without legislative authority serve to undermine public use requirement); *City of Mesa v Smith Co of Arizona*, 816 P2d 939, 941-943 (Ariz Ct App 1991) (municipality may exercise the right of eminent domain only when conferred upon it expressly or by necessary implication). As *Edward Rose Realty* taught, a specific state legislative declaration must confer authority on the local government and declare that the specific purpose is a public one.

The Economic Development Corporation correctly points out that this case is controlled by *Edward Rose Realty*. (EDC Brief, p 9 n 3, 45). According to the EDC, in the absence of a state legislative declaration of public purpose and necessity, the Court of Appeals erred in relying on *Poletown Neighborhood Council v Detroit*, 410 Mich 616; 304 NW2d 455 (1981). The EDC recognizes that "[p]ublic purpose is a state legislative determination, subject to judicial review only for abuse of discretion." (EDC Brief, p 6). The EDC also agrees that private property may be taken only when "(i) the action is undertaken in furtherance of a public purpose as defined by the state legislature." (EDC Brief, p 46). The County has pointed to no legislative

declaration that a mixed use business park is a public purpose requiring use of condemnation. In contrast, as the EDC reminds the Court, the public purpose at issue in *Poletown* was legislatively-declared in the Economic Development Corporation Act. *Id.* The EDC also observes that, under that statute, multiple determinations of necessity and public use or benefit are required after input from the public. *Id.* These statutory safeguards were presumably created by the legislature to ensure that the power of eminent domain is not wrongfully used at the behest of favored private interests. See generally, Steven M. Simpson, *Judicial Abdication and the Rise of Special Interests*, 6 Chap L Rev 173, 199-200 (2003) ("governments often use the power of eminent domain to dole out special favors or to lure preferred businesses to their areas").[1]

This Court taught in *Edward Rose Realty* that if the purpose has been declared by the state, the reviewing court should defer to that declaration. But if the purpose has been declared by a local legislative body (such as a county), then the reviewing court must carefully scrutinize the proposal to determine if it is "essential or indispensable to the accomplishment of the objects and purposes of the municipality." *Edward Rose Realty, supra.* Both the EDC and the property owners agree that the Court of Appeals erred when it failed to apply that stricter standard here. Although the EDC does not address whether this project is essential or indispensable to county government purposes, neither it nor other amici nor the County have supplied authority

[1]The Michigan Judicial Council recognized in its 1931 report that Michigan constitutional provisions, including the constitutional necessity requirement stemmed from "a belief, probably well founded at that time, that private property was often taken improperly and without necessity, and that the pretense of public utility was often a cloak for private aggrandizement." *Id.* at 70. These same concerns exist today and require this Court's careful attention to the statutory and constitutional limits created to protect the rights of property owners.

supporting the conclusion that the condemnation of nonblighted private property to develop a mixed use business park is essential for county government purposes.

The City of Detroit also acknowledges that a municipality can only declare a public use and exercise eminent domain when the state has delegated that power to it. (City of Detroit Brief, p 13, n 3). The City of Detroit concedes that the municipality's role is limited to declaring that its exercise of delegated power is "consistent with or authorized by some general or specific statute." (*Id.*) But the City tries to get around the absence of any state legislative declaration by urging this Court to weaken these traditional requirements. The City argues that a declaration "is always either express or implied when a legislative body authorizes the use of eminent domain to effectuate the purposes of any statute." (*Id.*) This approach was explicitly rejected in *Edward Rose Realty*. The City of Detroit brought its condemnation action in *Poletown* under both the Economic Development Corporation Act, MCL 125.1601 et seq. and under MCL 213.51. This is consistent with the property owners' interpretation of the statutes. MCL 213.51 provided the procedural mechanism for taking the property; MCL 125.1601 provided the substantive declaration of public purpose. See 410 Mich at 458 quoting legislative declaration that the powers granted in the act for economic development constituted "essential public purposes and functions for this state and its municipalities."

Wayne County seeks to overcome these problems by pointing to past decisions which discussed a "municipality's ability to choose the condemnation statute under which it will proceed." (Wayne County's Brief, pp 11-14). But under that reasoning, a municipality can, and undoubtedly will, choose the statute which requires the least effort to condemn property. Contrary to the legislature's clear mandate, municipalities seeking to clear blighted land by condemnation or to knock down slum apartments will not use the specific, though procedurally-

onerous, statutes that address those situations. They will employ MCL 213.23 thus negating much of the legislative work of the past thirty years. That legislative work stems from the legislature's understanding that a local government may only exercise delegated power to condemn property when a grant of authority is coupled with a state-legislative declaration that the specific purpose constitutes a public use and when the condemnation is accomplished in accord with an applicable procedural statute setting forth the appropriate steps.

The County blurs the procedural and substantive aspects of state delegations of the right to exercise eminent domain. A study of the history of eminent domain in Michigan reveals a complex array of (1) statutes that were enacted to delegate power to various state and local agencies coupled with (2) statutes declaring that the exercise of eminent domain for a specific purpose amounts to a public use, and (3) statutes creating methods for the exercise of this power.[2] See also First Report of the Judicial Council of Michigan, 17, January 1931, attached as Exhibit 1 (discovering complex history of condemnation statutes).

Statutory grants of power specify to whom the power is delegated, the purposes or uses for which it can be employed, and the methods by which it is to be accomplished. Each of these necessary aspects of a delegation of eminent domain power must be embodied in state legislation to empower a condemning authority to take property. Wayne County is empowered to take private property only when the state legislature delegates that power, declares that the use for which the property is to be condemned is a public one, and declares that condemnation is a necessary tool. Wayne County locates the source of its claimed power in Public Act 149, a

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[2]MCL 830.414; MCL 460.816; MCL 474.56; MCL 390.648; MCL 380.431a; MCL 331.57; MCL 331.9; MCL 324.78105; MCL 324.34104; MCL 324.30923; MCL 280.564; MCL 280.522; MCL 280.470; MCL 125.1660; MCL 125.1622; MCL 125.917a; MCL 213.583a; MCL 125.286; MCL 125.216; MCL 124.285; MCL 124.255.

statute that contains only a procedural vehicle for taking property. Act 149 must be coupled with other statutory delegations of substantive power to take property. That is why the statute limits its scope to takings 'within the scope of its powers." MCL 213.23.

Wayne County cites only three authorities in support of its interpretation of MCL 213.23, none of which read the statute as a grant of authority for a local government when not coupled with other statutes. *In re Opening of Gallagher Avenue, Johnson's Appeal*, 300 Mich 309; 1 NW2d 553 (1942), involved a board of county road commissioners' effort to condemn land to open Gallagher Avenue. The property owner argued that the county could not proceed under Act 149 because the statute had been repealed by Act 352, Public Acts 1925. (1925 PA 352 attached as Exhibit 2). The property owner did not challenge the county's power to condemn property for the purpose of opening a street,[3] but argued that the county was obligated to proceed under the newer Act 352, which did not allow the condemning authority to discontinue a taking if the jury award was too high.[4] (See Briefs and Settled Record, attached as Exhibit 3). The later statute had been enacted to include "purposes upon which the legislature manifestly had doubt that these were public improvements within the first statute, and quite apparently the latter statute was an attempt to broaden condemnation power and not to limit the method nor make the latter act exclusive within its scope." *In re Opening of Gallagher Avenue*, 300 Mich at 312. This analysis suggests that Act 149 was not read as a substantive grant of authority for "any" purpose as Wayne County argues, but was read more narrowly.

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[3]The power to take property for streets was available as a matter of constitutional law. Article 13, §§ 3 and 5 specifically empowered the opening of private roads and the condemnation of land for opening or widening boulevards, streets, and alleys. Const 1908, art 13, §§ 3, 5.

[4]Act 149 allowed discontinuance and thus was procedurally advantageous to the condemning authority.

Union School District of the City of Jackson v Starr Commonwealth for Boys, 322 Mich 165; 33 NW2d 807 (1948) also provides no basis for reading Act 149 as a substantive delegation of power to a county. The lower court held that the school district could condemn property pursuant to Act 149 because the school district was a state agency and had complied with procedural requirements set forth in Act 149. 322 Mich citing *In re Attorney General v Lowry*, 131 Mich 639, 644; 92 NW 289 (1902) and *Daniels v Bd of Education of City of Grand Rapids*, 191 Mich 339; 158 NW 23 (1916). The property owner complained that the school district had failed to make an offer to purchase the property before filing suit as required by Act 149. The school district argued in its brief that "provisions of the 1881 Act found in the School Code which counsel for appellant (the property owner) insists we must follow grants to all school districts the power to exercise the right of eminent domain." (Brief for Appellee-Petitioner, p 6 attached as Exhibit 4). Having located a source of substantive power in the School Code, the school district insisted that it could proceed using the "method" included within the provisions of Act 149, the general condemnation act. The school district preferred Act 149 because it could discontinue its effort to take property if "we thought the jury's verdict was for an amount which we could not or should not pay...." *Id.* at 9 citing *In re Detroit Bd of Education*, 242 Mich 658, 660; 219 NW 614 (1928). The school district pointed out that "counsel for appellant-respondent is confused on the grant of a power and the grant of the means of exercising the power." The school district insisted that "[d]iffering procedural steps for the exercise of a granted power are not a denial of the power itself." *Id.* The property owner never argued that the school district lacked authority to condemn property for a school because the general school code contained a provision empowering school districts to condemn property. (Brief for Respondent and Appellant, p 9-10, attached as Exhibit 5). (See MCL 340.711, 1955 PA 269, School Code of

1955, attached as Exhibit 6). See also, *In re Warren Consolidated Schools*, 27 Mich App 452; 183 NW2d 587 (1970) (citing *Union School District* as support for its ability to condemn land for a school under MCL 213.21).

These decisions offer no support for Wayne County's effort to rely on Public Act 149 as its sole source of authority to condemn property for a mixed use business park. The portions of the act that remain in effect today do not declare that development of a mixed use business park is a public use. Nor do they declare that the exercise of eminent domain is necessary to develop that public use. MCL 213.23 serves as grounding for condemnation by providing a procedural mechanism that must be coupled with a grant of the substantive power to condemn property and a state legislative declaration that the use is public and that condemnation for that use is necessary.[5]

In contrast, MCL 125.1622 references the general enabling statute, Act 149, as the procedurally empowering vehicle. The state legislative declaration to public use and necessity, embodied in MCL 125.1622, is coupled with MCL 213.23 to provide the local government with power to condemn property for the state designated public purpose:

> A municipality may take private property under Act No. 149 of the Public Acts of 1911, as amended, being sections 213.21 to 213.41 of the Michigan Compiled Laws, for the purpose of transfer to the corporation, and may transfer the property to the corporation for use in an approved project, on terms and conditions it deems appropriate, and the taking, transfer, and use shall be considered necessary for public purposes and for the benefit of the public.

The statute also contains a detailed and lengthy recitation of the public purposes of the Economic Development Corporation Act. MCL 125.1602. Likewise, MCL 125.1660 expressly authorizes

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[5]The second sentence of MCL 213.23 contains a substantive grant of authority for state agencies to condemn property. MCL 213.23a also provides a substantive grant of authority to condemn for highway purposes. This section was not added until 1945 and is inapplicable here. (1945 PA 288, attached as Exhibit 7). Neither substantive grant of authority applies here.

a municipality to take private property under Act No. 149 to transfer to a Downtown Development Authority for its use in an approved development for public purposes and for the benefit of the public. MCL 125.1600. See also MCL 125.2587 (eminent domain under Empowerment Zone Corporation Act); MCL 125.2627 (eminent domain under Enterprise Community Development Corporation Act); MCL 125.72-75 (eminent domain under Blighted Areas Redevelopment Act); MCL 125.2660 (eminent domain under Brownfields Redevelopment Financing Act).

Without relying on these statutes, Wayne County seeks to take property that is not blighted or contaminated, and does not contain unsafe, substandard, or dilapidated buildings or housing. The County's declared use of the property is to sell or lease it to private entities for a mixed use business park. Such unprecedented use of the power of eminent domain exceeds any statutory delegation of power and violates the constitutional limits imposed under article 10, section 2 of the Michigan Constitution. The demarcation between permissible and impermissible condemnations for slum clearance or related efforts need not and probably should not be drawn in this case. Those issues are not presented here—a point ably made by amici. The issues in this case can be resolved by applying *Edward Rose* to conclude that Wayne County lacked authority from the legislature to condemn property for a mixed use business park because it relied on only a general enabling statute, its purpose is not essential or indispensable to county government, and no express state legislative grant of authority and declaration of public use has been coupled with the general enabling language of Public Act 149.

2. Wayne County Failed To Adequately Demonstrate Necessity On the Record Facts.

From the early days of statehood, Michigan courts have recognized and enforced the property owner's right to challenge and test necessity examining whether a project is necessary

and whether condemnation of a specific parcel is necessary for the proposed project. *Grand Rapids Bd of Ed v Bacziewski*, 340 Mich 265, 270; 65 NW2d 819 (1954) citing *Trombley v Humphrey*, 23 Mich 471 (1871). *In re Jeffries Homes Housing Project*, 306 Mich 638, 647; 11 NW2d 272 (1943). Careful inquiry is required because "private property was often taken improperly and without any necessity, and that the pretense of public utility was often a cloak for private aggrandizement." *Paul v Detroit,* 32 Mich 108, 114 (1875). According to Justice Campbell, this inquiry is critical to prevent private entities from using their influence to obtain property:

> Ways were forced through private property to enrich owners of other property, who were enabled by intrigues and sinister influences to induce municipal bodies to use the public authority to subserve their private schemes. [*Id.* at 114.]

See also *Mansfield, Coldwater & Lake Michigan RR Co v Clark*, 23 Mich 519 (1871); *McClary v Hartwell*, 25 Mich 139 (1872).

The record fails to support Wayne County's argument that condemnation of the defendants' land is necessary. First, Wayne County hints that its project stems from FAA mandates. (Wayne County's Brief, p 2). But Wayne County does not support this assertion. The FAA did not mandate condemnation of property for the development of a mixed use business park. The FAA simply provided funds for the "voluntary" purchase of land and required that the land be put to use rather than simply held vacant. The project is not part of the airport or necessary for airport purposes. Not surprisingly, Wayne County does not argue that point.

Wayne County focuses its attention on its claimed difficulty in obtaining some parcels of property after it had initially obtained others. Critics have suggested that this hold-out theory is a poor justification for allowing takings for private use. See Donald J. Kochan, *"Public Use" and*

the Independent Judiciary: Condemnation in an Interest-Group Perspective, 3 Tex R Law & Pol 49, 85-92 (1998) ("no a priori reason to believe that the marketplace is incapable of crafting private-order solutions to the problem of hold outs"). Wayne County predicates necessity on the economic realities of the marketplace, a proven method of allocating costs and benefits. Even where the market will not support a particular economic use of property, eminent domain is not properly used to step in and assist in an otherwise non-profitable enterprise. See e.g., *Paine v Savage*, 126 Me 121, 123-126; 136 A2d 664, 125 (1927) (necessity cannot be derived from a claimed need by one or more private entities to acquire property for their endeavors). See also *Southwestern Illinois Development Authority v National City Environmental LLC*, 768 NE 2d 1, 16-27 (Ill, 2002) (using condemnation to help private raceway build parking lot cheaper than it could have done on property it already owned was not a public use).

Wayne County arbitrarily created project boundaries based on budgetary and other practical concerns when county employees used a magic marker to draw a line around areas that the County had purchased due to FAA noise reduction requirements reducing it from 1,800 to 1,300 acres. (Tr, 9/24/01, pp 20-28; Apx 490a-498a). (See also Wayne County's Brief, p 3). Unlike a project in which a single end use can only be accomplished with all parcels in an area, the County's plan is to sell the property to many private developers. (Tr, 9/24/01, p 51; Apx 521a; Tr, 10/10/01, p 67; Apx 715a; Tr, 10/22/01, p 46; Apx 809a). The County has only said the project is not speculative, that it tried to assemble land through negotiation and eminent domain, and that two percent of the area is needed to complete the land assembly. (Wayne County's Brief, pp 17-24). While economic considerations may be relevant in acquisition decisions, there is no indication that economic considerations alone are sufficient justification for taking property. *City of Troy v Barnard*, 183 Mich App 565; 455 NW2d 378 (1990).

C. Eminent Domain Under The Michigan Constitution Has Not Traditionally Prohibited A Condemning Authority From The Taking Of Privately-Owned Non-Blighted Property For Transfer To Private Corporations For Private Use Even If There Are Incidental Economic Benefits To The Public.[6]

Wayne County and amici argue that *Poletown* and other Michigan decisions have historically allowed use of eminent domain for "creation of mills, canals, toll roads, railroads, public utilities, and the like." (Wayne County's Brief, p 5). In making this argument, they seek to persuade this Court that the reasoning in *Poletown* did not significantly change the law. They insist that the Michigan Constitution does not, and never has, limited eminent domain to property taken for "public use" in the strict sense of the words. But careful review of Michigan condemnation law does not support these arguments.

Under Michigan law, property can never be condemned for private improvements. This state's renowned scholar and judge, Justice Cooley wrote in his treatise:

> The public use implies a possession, occupation, and enjoyment of the land by the public at large, or by public agencies; and a due protection to the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another, on vague grounds of public benefit, to spring from the more profitable use to which the latter may devote it.

Bd of Health of Twp of Portage v Van Hoesen, 87 Mich 533; 49 NW 894 (1891) quoting Cooley, Const Lim (6th ed) at 654. This settled principle means that property can not be taken from one private owner to give to another. See e.g., *City of Center Line v Chemlko*, 164 Mich App 251,

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[6]Precision in analysis is critical to this Court's proper consideration of the complex array of issues presented in this appeal. Many of the briefs merge statutory and constitutionally-based decisions and fail to carefully analyze the interplay between the two. Under a proper analysis of all elements of the statute purportedly empowering the County to condemn property and the constitutional provision limiting the power of eminent domain, the County must show that it has been empowered by the state to take property, that the project and proposed use of eminent domain is for a public purpose or benefit, that the project is necessary, and that the particular property is necessary for the project. This is required to satisfy MCL 213.23. The County must also demonstrate that the Court is taking property for a "public use." This is required by Const 1963, article 10, section 2.

254; 416 NW2d 401 (1987); *Tolksdorf v Griffith*, 464 Mich 1, 9; 626 NW2d 163 (2001); Const 1963, art 10, § 2. The mills, canals, railroads, and utilities were able to exercise condemnation only where the state itself reserved the right to "supervise and control the use by such regulation as shall ensure to the public the benefit promised thereby, and as shall preclude the appropriation being defeated by partiality or unreasonably selfish action on the part of those who only on the ground of public convenience and welfare have been suffered to make the appropriation." *People ex rel The Detroit & Howell Railroad Co v Twp Bd of Salem*, 20 Mich 452, 482-483; 1870 Mich LEXIS 73 (1870) overruled in part by *Burdick v Harbor Springs Lumber Co*, 167 Mich 673; 133 NW 822 (1911).

Private corporations have been allowed to exercise the power of eminent domain only if they do so as public utilities for projects open to use by the public and heavily regulated by the government. *Swan v Williams*, 2 Mich 427; 1852 Mich LEXIS 27 (1852). The *Swan* court classified corporations into three categories: (1) political or municipal corporations which were created for public benefit and controlled by the legislature; (2) "associations which are created for *public benefit*, and to which the government delegates a portion of its sovereign power, to be exercised for public utility; such as turnpike, bridge, canal, and railroad companies"; and (3) strictly private corporations. 2 Mich at 434. The Court explained that only the first two categories could take private property because the powers delegated to them were "to work out a public use." *Id.* at 435. The *Swan* court made plain that eminent domain could be used only when "the tenure of the corporation is in the nature of a trust for the public use, subject to the supervision of the government," and can be revoked if not so used. *Id.* at 439-441.

Ryerson v Brown, 35 Mich 333 (1877) struck down a statute allowing mill owners to take property as unconstitutional because it was not based on necessity but on "profit and relative

convenience." *Id.* *Ryerson* rejected the argument that eminent domain was needed to improve mill-sites to produce prosperity reasoning that if the power were needed, "the land would generally be obtained on reasonable terms." *Id.* at 337. *Ryerson* also refused to uphold the use of eminent domain because nothing in the statute suggested that "power obtained under it is to be employed directly for the public use." *Id.* at 338. See also *Bd of Health of Twp of Portage v Van Hoesen*, 87 Mich 533; 49 NW 894 (1891).[7]

The mill acts had originally been "statutes providing for a public convenience—a place where 'all the inhabitants of the neighborhood should be entitled to have their grinding down in turn and at fixed rates'—[but later] had been redirected to what appeared to be increasingly private interests." See generally, Matthew P. Harrington, *"Public Use" and the Original Understanding of the So-Called "Takings" Clause*, 53 Hastings L J 1245, 1253-54 (2002). Over time, judges applied the "public use" language of the Fifth Amendment to restrain state legislatures. See e.g. *Bloodgood v Mohawk & Hudson RR Co*, 18 Wend 9, 56-62 (NY 1837) (Tracy, J, concurring) cited in Harrington, 1255 n 29. In *Bloodgood*, Judge Tracy interpreted the phrase "public use" "'a constitutional declaration, that private property without the consent of the owner, shall be taken only for the public use,' by which he meant 'direct possession, occupation and enjoyment by the public.'" *Id.* See also *Missouri Pacific Railway Co v Nebraska*, 164 US 403; 17 S Ct 130; 41 L Ed 489 (1896).

Amici wrongly point to judicial decisions approving use of eminent domain for slum clearance as authority for the County's conduct here. See e.g., *In re Brewster Street Housing Site in the City of Detroit*, 291 Mich 313; 289 NW 493 (1939). The defendants' property is not

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[7]This same analysis applies here where the County is engaged in land assembly for private entities. Using eminent domain to acquire the remaining parcels at a more profitable price, like the use of eminent domain by the mill owners, violates the constitution.

blighted, does not contain substandard housing or dilapidated buildings, and does not require use by the public to clear contaminated land or eliminate unsafe and unhealthy conditions. Other jurisdictions have rejected use of eminent domain for redevelopment projects in the absence of blight. See e.g. *Crommett v City of Portland*, 150 Me 217; 107 A2d 841 (1954). The Maine Supreme Court distinguished projects such as Wayne County's redevelopment effort from permissible slum clearance because there "is no element of private use in the removal of the conditions of blight." *Id* at 850. The Maine Supreme Court defined "public use" as "use by the public, or employment by the public," and not "public advantage." *Id.* at 851. Recognizing that the line between a public and private use is easier to draw with active uses in the sense of a public utility, the Court concluded that slum clearance is a public use insofar as the taking is to correct harmful conditions. *Id.* But the Court emphasized that "[h]owever beneficial it might be in a broad sense, it would clearly be unconstitutional for the Legislature to provide for the taking of any area in a city for the purpose of redevelopment by sale or lease for private properties." *Id.* at 852. See also *Papadinas v City of Somerville*, 331 Mass 627; 121 NE2d 714 (1954). Slum clearance has been recognized by Michigan courts as an appropriate public use. See *In re Slum Clearance in Detroit*, 331 Mich 714, 720; 50 NW2d 340 (1951) (slum clearance is a public use of property even if "the property taken is later to be resold to diminish the cost involved in the condemnation and for the purpose of reconstruction.") But those rulings provide no help to the County because the property at issue here is not blighted.

Wayne County and amici also look to federal law to support their position that taking non-blighted property for a mixed use business park passes constitutional muster. But *Hawaii Housing Authority v Midkiff*, 467 US 229; 104 S Ct 2321; 81 L Ed 2d 186 (1984) and other federal cases should not be used as a basis for allowing this proposed taking. First, the federal

courts have traditionally deferred to state decisions on federalism grounds, a factor not present in this Court's interpretation of the Michigan Constitution. Second, federal law is not binding on this Court when it interprets the Michigan Constitution. The Michigan takings clause stems from the Northwest Ordinance, which was enacted before the United States Constitution. See James W. Ely, Jr., The Guardian of Every Other Right 55 (Oxford Press 1992). Madison "drew on the language of the Northwest Ordinance and the Massachusetts and Vermont constitutions" to draft the just compensation provision of the federal constitution. *Id.* Given this sequence of drafting, this Court should give content to the language embodied within the text of Michigan's Constitution even if its decision deviates from federal law. Third, federal courts have adopted an approach to the "public use" clause that analyzes takings as socioeconomic regulatory measures arising out of the state's police powers. *Midkiff*, 467 US at 242-43. But this approach ignores the close relationship between liberty and property rights. Equally troubling, it fails to give the same priority to protection of property rights that courts provide to other fundamental interests. See generally, Camarin Madigan, *Taking for Any Purpose?*, 9 Hastings W-NW J Env L & Pol 179 (2003). Instead, it substitutes a post-*Lochner* rational basis due process test for the text-based "public use" requirement of earlier days. Compare *Thompson v Consolidated Gas Corp*, 300 US 55, 80; 57 S Ct 364; 81 L Ed 2d 510 (1937); *City of Cincinnati v Vester*, 281 US 439, 446; 50 S Ct 360; 74 L Ed 2d 950 (1930); and *Missouri Pacific Ry Co v Nebraska*, 164 US 403, 417; 17 S Ct 130; 41 L Ed 489 (1896) with *Berman v Parker,* 348 US 26; 75 S Ct 98; 99 L Ed 2d 27 (1954) and *Midkiff, supra.*

Moreover, *Midkiff* can readily be distinguished because it involved use of state legislative police power to correct an anomalous land ownership in Hawaii, the lack of private land ownership, which created extreme concentrations of land ownership. 467 US at 240-243.

Eradication of the incidents of a feudal system was a permissible use of police power even when it involved eminent domain to eradicate these incidents of feudalism[8]. *Berman* involved slum clearance, long considered a public use. Thus, federal takings law provides no support for the County's action here.

The erosion of the public use requirement has allowed an increasingly aggressive use of eminent domain on behalf of private interests that are "using cities as their personal real estate agents." See discussion and decisions cited in Jennifer J Kruckeberg, *Can Government Buy Everything?: The Takings Clause and the Erosion of the "Public Use" Requirement*, 87 Minn L Rev 543 (2002) and Stephen J Jones, *Trumping Eminent Domain Law: An Argument for Strict Scrutiny Analysis Under the Public Use Requirement of the Fifth Amendment*, 50 Syracuse L Rev 285 (2000); Joseph J Lazzarotti, *Public Use or Public Abuse*, 68 UMKC L Rev 49 (1999); Todd A Rogers, *A Dubious Development: Tax Increment Financing and Economically Motivated Condemnation*, 17 Rev Litig 145 (1998). In Michigan, this erosion can be traced to *Poletown*, a decision that severely restricted the "public use" limitation and resulted in the approval of condemnation in circumstances never before contemplated by Michigan courts. The City of Dearborn now boldly asserts that this Court take the final step and give condemning authorities the unfettered discretion of merely asking if the object of a taking is for a public benefit. (Dearborn Brief, pp 19-34).

When *Poletown* was decided, Justice Fitzgerald warned against departing from Michigan's traditional approach which "limit[ed] the eminent domain power to situations in

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[8]Opposition to a feudal system of land ownership can be traced to the earliest days of the Republic. See Federalist Paper No. 17 and No. 45, pp 116-117, 287 (Clinton Rossiter ed 2003). Feudal or aristocratic systems were founded on dominion over land. The Debate on the Constitution, pp 155-160 (1993).

which direct governmental use is to be made of the land or in which the private recipient will use it to serve the public." He noted that the only "significant departure" from this bright-line rule was for "slum clearance" decisions, which said the "clearing of a blighted area is a 'public use.'" 410 Mich at 643. Until 1972, economic development had never been considered public use of property. Justice Ryan also disagreed with the *Poletown* majority's broad approval of condemnation. He concluded that, before the *Poletown* decision, three common elements were required to pass constitutional muster: "1) public necessity of the extreme sort, 2) continuing accountability to the public, and 3) selection of land according to facts of independent public significance." 410 Mich at 674-675. But the *Poletown* majority rejected these warnings and embarked on a new era of takings jurisprudence.

The condemnation at issue here extends even beyond that approved in *Poletown*. It does not amount to a taking for "public use" under even the broadest understanding of these words. Thus, this Court should reverse the lower courts and adopt a reading of article 10, § 2 that bars Wayne County's use of eminent domain.

D. If *Poletown* Is Overruled, The New Rule Should Apply To This Case.

Wayne County asks this Court to rule that, even if it has acted without authority or has tried to take property in violation of the defendants' constitutional rights, this Court should nevertheless require these property owners to give up their land. Nothing in Michigan law supports such a result. See generally, *Williams v Detroit*, 364 Mich 231; 111 NW2d 1 (1961) (finding no case in which benefit of new rule not given to parties before the court even if new rule made prospectively applicable). Wayne County's emphasis on money spent and property assembled is misleading and provides no grounds for deviating from the normal rule of applying decisions to the case before the court and other cases pending in the system before final

judgment. Wayne County points to moneys spent—much of which came from FAA dollars to purchase properties voluntarily and have nothing to do with any "reliance" interest. Wayne County also fails to make clear that its project can proceed without these parcels. Moreover, the statutes governing condemnation allow for expedited appeals of necessity appeals to protect against delay. They also provide that title does not vest in the condemning authority until after the conclusion of those appeals. MCL 213.57. Thus, the County has not obtained title to the property—and has no reliance interest in obtaining it.

RELIEF

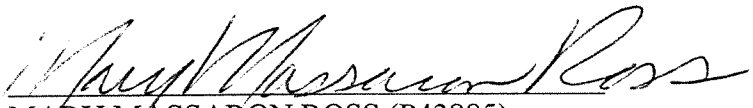
WHEREFORE, defendants-appellants respectfully request that this Court reverse the decisions of the Court of Appeals and the circuit court and remand this matter to the circuit court for the entry of judgment in favor of the defendant-appellants. Any rule of law adopted here should apply to protect the property owners who are before the Court.

Respectfully submitted,

ACKERMAN & ACKERMAN, P.C.

ALAN T. ACKERMAN (P10025)
DARIUS W. DYNKOWSKI (P52382)
Attorneys for Defendants-Appellants
Except Specks
5700 Crooks Road, Suite 405
Troy, MI 48104
(248) 537-1155

PLUNKETT & COONEY, P.C.



MARY MASSARON ROSS (P43885)
Attorney for Defendants-Appellants
Except Specks
535 Griswold, Suite 2400
Detroit, MI 48226
(313) 983-4801

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INDEX TO EXHIBITS

1.	First Report of the Judicial Council of Michigan, 17, January 1931
2.	1925 PA 352
3.	*In re Opening of Gallagher Avenue, Johnson's Appeal*, Briefs and Settled Record
4.	*Union School District of the City of Jackson v Starr Commonwealth for Boys*, Brief for Appellee-Petitioner, p 6
5.	*Union School District of the City of Jackson v Starr Commonwealth for Boys*, Brief for Respondent and Appellant, p 9-10
6.	1955 PA 269, School Code of 1955, MCL 340.711
7.	1945 PA 288